SENIOR ARTICLES

Collective Bargaining Since the New Deal

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THE NATIONAL LABOR BOARD—CHAPTER I

Creation of the National Labor Board

In latter July of 1933 the Administration realized that its offensive on industrial unemployment and business depression must be accelerated. For over a month the NRA under General Johnson had been exerting herculean effort to formulate permanent codes for each industry. Cotton textile, electrical manufacturing, shipbuilding and ship repairing had been completed. Many more were in the process. Unfortunately the trade associations of most industries had just begun to call conferences. At best it would be many months before any real inroads would be made by this method into the uncodified mass of American industry. Meantime the drive for recovery must proceed. More wage dollars must find their way into the pockets of the workers. Increased production and increased prices depended on increased mass buying power. The hours of the employed must be reduced to make room for willing deserters from the ranks of the unemployed. Sweatshop wages must be destroyed. Section 7a of the NIRA must become part of our employer-employee relationships, for proper organization of labor could aid materially in achieving these objectives.

The Administration decided that a simple Blanket Code limited to these vital points of reducing hours, increasing minimum wages and reaffirming labor's right to organize, free from interference, would supply the added punch. It would bridge the gap till the permanent codes could take its place. The Recovery Administration composed such an elementary compact; named it the President's Reemployment Agreement; and took immediate steps to sell the PRA to the country. The sale was generally successful. Practically all employers signed it. Many did so reluctantly. They were swept along in the surge of patriotism that rolled across the land. If you didn't have a Blue Eagle in your store window or on your factory door you were told that you weren't doing your part to help wage war on the depression. Many employers

went through with their promises. Others did not. Blithely they had signed, just as blithely they violated their promises. Some did so by paying less than the blanket code minimum. Others worked their men overtime. Still others refused to meet with union representatives and fired employees who they discovered had joined outside labor organizations.

Where workers were organized or organizing, these instances of violation laid the groundwork for future disputes. Add to these new causes of friction the sudden restlessness of the rank and file of the previously organized. For four long years their wages had been going down, down, and down. The talk of increasing profits for the owners whetted their long subdued desire to reverse this downward spiral of deflation. Suddenly, workers in industries scattered across the country were on the march. Live industrial volcanoes, some tiny, some vast, were sporadically springing up in all parts of the nation.

This telescopes the days that led up to August 5th and the creation of the National Labor Board. From Washington, that day, there flashed forth across the country a joint appeal from the Industrial and Labor Advisory Boards of the NRA to all industry and all labor. It took the form of a statement directed to President Roosevelt. It urged management and labor to avoid those acts that made for industrial conflict, to respect each others' rights and to maintain industrial peace pending the construction and adoption of the permanent codes. It appealed to their sound judgment to carry out the PRA with regard to the letter and spirit of the NIRA. Finally it recommended the creation of a Board (with sub-boards located in central and local positions over the country) which would help iron out any difficulties and problems arising out of differing interpretations of the PRA.[1] The companion message, theoretically an answer to the Washington appeal, went out the same day from Hyde Park.[2] In it, President Roosevelt announced the creation of the National Labor Board under the powers granted him by NIRA. Its declared purposes were to conciliate, mediate, and arbitrate disputes arising out of conflicting interpretations of the PRA. He felt that it would set the pace for the prevention of lockouts and strikes throughout the country by marking a new precedent in establishing methods of voluntary cooperation for settling disputes between capital and labor. News reports suggested that it was implied in his message that he felt public opinion would play the major part in enforcing the Board's decisions.[3] The personnel of the first Board consisted of Sena-

[1] Industrial and Labor Advisory Boards Statement, N. Y. Times, Aug. 6, 1933, 2:2, 3:1.
[2] President Roosevelt's Statement, ibid.
[3] N. Y. Times, ibid.

tor Wagner of New York, chairman; Gerard Swope (General Electric), William Green (A. F. of L), Walter Teagle (Standard Oil of New Jersey), John L. Lewis (United Mine Workers of America), Louis Kirstein (Filene's of Boston), and Leo Wolman (Columbia University).

It is well to record the attitude which from the first directed the Board's general course of action. R. L. Duffus writing in the New York Times for the 15th of October, Section 8, touched on this. In substance he said: "The psychology of conflict is being ruled out, and that of conciliation and cooperation is being substituted. The emphasis of the NRA and the Labor Board has been placed upon setting up a system of negotiations and adjudications which will take the place of strikes and lockouts. The law will not be the law of the civil courts but a new industrial code, independent of civil courts, though legally sanctioned by them, and violating no individual rights under statute or common law. Such is the objective resting on the conviction, still of course to meet the test of experience, that there is no irreconcilable antagonism between the basic rights and interests of the employer and those of the employee."

This offers a sufficient part of the guiding attitude back of the new Board, for one to block in the underlying philosophy leading up to this guiding attitude. Expressly the starting piint is that employers and employees will compose their industrial differences either by the old way of warfare, followed by the usual bitter peace treaty, or by the new way of negotiation and adjudication. Such a limitation to two possible alternatives assumes, however, that labor is collectively organized. For where labor is not so organized there is the third alternative that the workers, because they deal as individuals, necessarily do not have power to fight for their rights or power to negotiate peacefully for better conditions. As individuals therefore, either they accept whatever conditions and terms are laid down by their employer or they quit their jobs. By such limitation to two alternatives, it impliedly appears that the true starting point of the underlying philosophy commences with a break from the ordinary view of business men that bona fide collective bargaining is not necessary. Such philosophy accepts the traditional premise of our business men that healthy economic conditions depend largely on liberty of contract between employer and employee. The break comes however in the conviction that true liberty of contract begins in the equality of the position of the parties to the employment contract. It points to the tremendous inequality in bargaining power that the machine age has wrought. Sincerely and correctly it believes that true collective bargain-

ing, alone, will place the employees in a position more nearly equal to that of their employer. Without this, healthy economic conditions are not possible. Section 7a of NIRA (Title 15, U.S.C.A. 701-712) by its declared establishment of collective bargaining free from employer interference crystallized this underlying philosophy of the new Board and wrote it into the law of the land. It was out of the necessity of enforcing Section 7a that the new Board arose. Thus the underlying philosophy was carried over to become the unexpressed part of the guiding attitude of the National Labor Board.

Projecting beyond this same declared guiding attitude there is something else. There is the belief that a body of precedent, apart from any interpretations of the courts, would and should be built up to give life and vitality to collective bargaining. Further there is the conviction (based on the presumption that the interests of the employer and employee are reconcilable) that the Board can become an effective mediatory force to hear and settle all labor disputes over terms, tenure, and conditions of employment.

Of the extremeliy important point of sanction for its decisions, there was very little said in these early days.[4] As an instrument of arbitration of course it could construct enforceable decisions. As an agency of conciliation it could only investigate the facts and try to bring the parties together with some workable arrangement. As to any decisions, finding an employer guilty under Section 7a, nothing was said as to taking steps under the penal provisions of the Recovery Act or as to the seeking of injunction sanction against possible violators. Undoubtedly a too buoyant optimism as to the strength of public opinion supplemented by the fear that the courts would knock out attempts at such enforcement, caused the soft pedaling of this possibility and the continual emphasis on the power and force of public opinion as a means of enforcement.

As one studies the life of the National Labor Board and its successor, he should keep fixed in his mind this whole picture of the guiding attitude of the new formed Board. Without understanding the spirit behind the inception, the unfolding story has no beginning.

The Coming of the Regional Boards

In less than three months time the volume of cases had become too large for the National Board to give them that swift consideration which labor cases need. It was time to take advantage of that granted power to set up central and local organizations to assist it. On October 28th Chairman Wagner acting for the Board announced the formation of

[4] Senator Wagner appeals to Labor and Capital to use NLB, N. Y. Times, Sept. 11, 1933, 6:1.

regional boards in New York, Philadelphia, Chicago, San Francisco, Cleveland, St. Louis, Seattle, New Orleans, Detroit, Minneapolis, and Atlanta.[5] From the vantage point of a year and a half later, the establishment of these boards and the rules laid down by the National Board to govern their action mark a very significant step in Labor Board history. Congress had declared labor's right of collective bargaining and for the first time had generally written the correlative duty of employer non-interference into the law of the nation. The establishment of these Regional Boards suggest that the New Deal intended taking steps to protect that newly given right. For here were created eleven new agencies whose combined jurisdictional areas covered the country. And to each of these agencies was assigned chiefly, the task of enforcing Section 7a by means of independent fact finding and publicity. History has shown the impotence of this means of enforcement in many situations. But the significance of this country wide set up, remains. The rules laid down for the conduct of these boards are also of significance. Scrutiny shows that the main elements in the developing mechanics of the whole structure were fairly well crystalized by what happened on October 28th. The personnel of these boards was to include equal representation of management and labor with an impartial chairman to guide them. The procedure then set up was definitely that of an administrative Board. Upon filing of the complaint, a complete statement of fact was demanded. The Board was to work out a settlement on such facts but if unable to do so, it was to call a hearing. All parties were to be cited for appearance. The Board was to probe into the problem and draw out all pertinent facts. Legal rules of evidence were not to be followed though the Board was to give little credit to hearsay. If it was an arbitration case the decision, of course, was binding on the parties. If not, and there was a refusal to accept the decision, the transcript was to be sent to Washington. The National Board retained the right of review. In all events any determination of law was to be reserved for the National Board. But if a case came up, reliance ordinarily was to be on the statement of facts sent on to it by the Regional Board. In addition to personnel and procedure, jurisdiction is the third and final element to be noted. By virtue of the creating statements, the National Labor Board was to resolve conflicting interpretations arising out of the PRA. As the days went on, the country was faced with other disputes growing out of controversies concerning permanent codes and wage and hour conflicts. Industrial peace demanded the intervention of the Board. So no one challenged the offers of conciliation put forward

[5] N. Y. Times, October 28th, 1933, 5:1.

by the Board and the acceptances of conciliation efforts by the parties. In light of this jurisdictional expansion, it is easy to understand the scope of the jurisdiction now delegated to the new Regional Boards, which was to embrace all disputes, involving the interpretation and application of the PRA, the industrial codes, and which otherwise effected the national program of economic recovery. Any apparent discrepancies between the original grant of power and the power later assumed and delegated, are erased by the ratifying executive order of December 16th which will be discussed later.

Thought there is an expansion of jurisdiction on one front, we find strict confinement on another. The area of action must be carved out so as not to conflict with other conciliation, mediation, or enforcing agencies of Section 7a. The Regional Boards were to work in harmony with the conciliators of the Department of Labor. They were not to take jurisdiction in any field where there might be a means of settlement already provided for, such as was established by the Bituminous and Cotton Textile Codes. Complaints, involving only individuals, were to be turned over to Compliance Boards or Compliance Directors. The latter stipulation narrowed the jurisdiction of the Regional Boards to the field of potential or actual conflict between management and organized labor.

Summing up these elements injected by the order of October 28th, we see that the Regional Boards personnel is to be of bi-partisan character (management and labor), secondly, that the hearing procedure is that of an administrative board, and thirdly, that the jurisdiction of the Boards wil concern itself with labor disputees containing possible or actual industrial strife.

President Roosevelt, on December 16th, moved to give adequate legal status to the National Board and the Regional Boards. Strangely enought, there had never been an executive order establishing the National Board or giving it power to create local boards, but official genesis had been apparently assumed to result from the August 5th message of President Roosevelt which incorporated in a sense, the one issued the same day by the Industrial and Labor Advisory Boards. Now, we find President Roosevelt by executive order, continuing the National Board, ratifying all the action taken, and setting out its powers. It is chiefly a restatement of the powers already exercised. It is definitely stated that the Board was given power to settle, mediate, and arbitrate all controversies between employers and employees which tend to impede the purpose of NIRA, provided, however, that it could decline to take

cognizance where other means of settlement provided for, had not been invoked.

Collective Bargaining Elections Sanctioned

As the Labor Boards got deeper into the work of settling labor complaints and disputes, we find it fact to face with the realization that American industry was not going to accept the coming of Section 7a, without a struggle. Most employers had been quick to realize that they could provide employee representation plants and thus ward off the attempted invasion of bona fide trade unionism. Company unions mushroomed into existence over the whole country. In many companies and businesses, representation plans of yesteryear which had perennially dragged along were now given new life by employers. On the other side of the picture there was the A. F. of L., the Communist unions, and the scattered independents, carrying on the heaviest organizational campaigns in their history. The battle lines were drawn between company unionism and outside unionism. True, the requirement of membership in a company union as a condition of employment had been outlawed by Section 7a but the National Board had ruled that a company union, if not company dominated, could bargain for the workers. Thus one of the prime problems facing the Board became that of determining in many cases which agency the workers wanted. The traditional American settlement of issues by ballot, suggested itself as a possible way out. The Labor Board tried it. It seemed to work pretty well. For instance, certain of the bituminous coal miners voted on November 23rd, 1933. Representatives were selected without a hitch.[6] The secret ballot seemed a good way to discover what the workers really wanted. Elections resulted in victories for the United Mine Workers in nine out of 15 mines of the H. C. Frick Coal Co., known as captive mines.

But election technique met with difficulty. Some employers refused to turn over their payrolls to permit the conduct of elections by the Board. The Board needed power to combat the opposition. They needed the power to be able to say, "Regardless of what you as a company think about this matter, we are going to give your workers a chance to say for themselves what they want." As a statutory substitute, they sought power from President Roosevelt. His executive order of February 1st as amended February 23rd, 1934, fortified them somewhat on this point.[7] The Board was now empowered to proceed with a collective bargaining election when it was satisfied that a substantial

[6] Prentice Hall, Federal—Trade—Industry, Vol. 1, p. 5509.
[7] Executive Order on Elections as amended February 23rd, 1934.

number (later set at least 10 per cent) of the employees of a plant, or unit, or of the employees of a specific division, wanted an election. The Board was to supervise the election according to its own rules and certify the elected representatives to the employees as the duly elected representatives.

This order marks the next vital step in the life of the National Labor Board. Vital first, because official sanction to hold compulsory elections was now given; vital second, because the order upholds majority rule, which we shall consider in connection with the interpretation of Section 7a at later stages in this report. It should be noted that even though Johnson's and Richberg's explanatory following statements knocked out the majority rule, these words of the executive order, clearly say that the representatives elected by a majority voting are thereby designated to represent all the employees eligible to participate in such an election for the purpose of collective bargaining in their relation with their employer. Finally, this order as amended, is vital, because it cut the bonds of review that to this date had bound the Board to the NRA. Henceforth, none of the findings of the Board, with regard to violations of Section 7a or to elections ordered thereunder but opposed by employers, were open to review by the Compliance Division of the NRA. The National Board was ,in the future, empowered to cite cases of violations to the Attorney General or to the Compliance Division, for action thereon. The day of hope that decisions would be enforced by the force of public opinion was gone. The National Board was now moving into the second phase of enforcement.

The increased volume of cases and the impossibility of the Board members devoting their entire time to the work, required an expansion in the personnel. President Roosevelt responded on March 4th with the addition of five men—really only four new ones, since Garard Swope of General Electric was reappointed after an absence. The new men were S. Clay Williams (Reynolds Tobacco Co.), Leon C. Marshall (adviser to A. F. of L.), Ernest Draper (Hills Brothers of New York City), and Henry Dennison of Dennison Mfg. Co.[8] Senator Wagner, Chairman of the Board announced simultaneously that the personnel would be split up into two panels with Williams heading one and Marshall the other, as vice chairmen, in order to further expedite the cases.

Experience of the National Labor Board

The National Labor Board continued until July 9th, 1934, ten days after the National Labor Relations Board was established by execu-

[8] On October 7th, Austin Finch, E. N. Hurley, Father Haas and George L. Berry had been added. Hurley died, Finch resigned. N. Y. Times, October 4th, 1933, 1:3. Later Pierre S. Dupont was added.

tive order. So far, the creation, the structure, the administrative operation, and the powers and jurisdicion of it and its Regional Boards have been described. Nothing specific has been said about the experiences of these Boards in dealing with their assigned field of operation. Such must now be sketched, else the complete story of these Boards would not be told. There are two sources to which one can go to obtain material. There is the volume of Decisions of the National Labor Board. This contains all the decisions handed down by the NLB and some very important summaries as to principles and case statistics. This paper will not go into the decisions but there will be occasion to refer to the summaries and principles. The other source is the Congressional Record. In it we find a copy of the Wagner Labor Disputes Bill which expresses largely the convictions of Senator Wagner, gained after six months' experience as Chairman of the NLB. Also there is found a number of pertinent statements made by Senator Wagner and other Senators. From this material the important lines of thought have been lifted out and brought together. The result is synoptic of the Board's ten months' experience.

I. The activities of the National Board and the 19 regional boards in the ten-month period from August 5th, 1933, to June 1st, 1934, show these statistical summaries.[9] Of over two million workers directly affected (more inclusive than exact workers involved), 1,750,000 have been returned to work, kept at work, or had their disputes settled. Of the 3755 cases handled, 3061 were settled; and notably enough, 1957, or about two thirds, were by agreement. Such agreements mean temporary peace at least.

These boards mediated 1323 strikes involving 870,000 workers. Seventy-five per cent were settled and 497 strikes were averted. Thus, in strike situations alone, boards returned to work or kept at work 1,270,000 workers.

II. The summary of principles outlined by Milton Handler, the Board's general counsel, adds accurate details to the story being unfolded.

Arbitration.—Where parties are not able to settle disputes by collective bargaining the NLB has frequently recommended arbitration. In some cases the Board itself has acted as arbitrator, upon the joint submission of the dispute by the parties (particularly in wage disputes). All arbitration is voluntary.

Collective Bargaining.—The Board has held that the employees' right to bargain collectively, imposes a duty on the employer to deal with

[9] Regional Boards were also placed at Buffalo, Boston, Indianapolis, Kansas City, Los Angeles, Newark, Pittsburgh, and San Antonio, making a total of 19 under the NLB.

them. It has been construed to mean the exercise of every effort to reach agreement. The Board has deprecated the calling of strikes without attempt at negotiations or the presentation of grievances on part of the employees.

Company Unions.—The Board has ruled that organization is a matter exclusively within control of employees. It has counseled a hands off policy on the part of the employer. It has condemned the initiation of company unions by an employer and the participation by him in its affairs where such initiation and participation have in effect been an interference with the employees self organization, or resulted, in fact, in the domination of the organization by the employer, and where the employees have not clearly consented, thereto. The Board has drawn a distinction, between Employee Representation plant which were fully submitted to the employees for their acceptance or rejection and plans which were imposed upon them. It has held, that the fact that an election of representatives has been conducted under a plan, does not constitute an approval of the plan itself.

Disclosure of Employee Names.—It is unnecessary for the collective bargaining agency to disclose the names of those whom it represents when it seeks to bargain collectively.

Discrimination.—Where there have been discharges because of union activity, contrary to Section 7a, the Board has ordered reinstatement. Other forms of discrimination have been held unlawful.

Elections.—The Board has employed the device of secret ballot under government supervision, when the employer has questioned the authority of a certain agency to act as representative of employees. The Board has held the manner of conducting elections to be entirely within the employees' discretion and the employer can in no way interfere with their conduct.

Form of Contract.—The Board has approved various forms of contract for designation of collective bargaining agency chosen by employees. In the absence of agreement, the Board has recommended that an agreement be made by employers and the agency, as representative of the employees.

Interference.—The Board has condemned intereference with rights guaranteed by Section 7a. Such interference may take various froms, such as discriminatory discharges, initiation of company unions, participation in its affairs, restrictions upon qualifications of representatives.

Jurisdictional Disputes.—Where, in construction of government projects the conflicting labor organizations are unable to settle disputes

by negotiation or are unwilling to submit the dispute to a Board of arbitration or where, the A. F. of L. has failed to adjust the controversy, the employer may then determine which union shall receive the disputed work.

Majority Rule.—Representatives selected by a majority of employees within given plant or department are the sole collective bargaining agency for the plant or department.

Preferential List.—In rulings terminating strikes the Board has frequently recommended that an employer, if business conditions do not permit him to reinstate the strikers at once, should place them on a preferential list and reinstate them in order of seniority before hiring any new employees.

Reinstatement.—The Board has recommended reinstatements as remedy for discharges which it condsidered discriminatory. It has also frequently recommended reinstatement of all strikers at conclusion, if business conditions permit, and a davision of work, wherever possible.

Representatives of Own Choosing.—The employees may select any representatives whom they choose as their agents for the purpose of collective bargaining. Employers may not restrict this right of choice in any way. Representatives may not be restricted to fellow employees. Since the word "representatives" in Section 7a is used in generic sense, employees may select a union as their representatives.

Seniority.—Reinstatement and placing on a preferential list in order of seniority after a strike have been frequently recommended in order to avoid all question of possible discrimination.

Violence.—The Board has ruled that striking employees who have been proven guilty of violence need not be reinstated.

Written Agreement.—The Board has often recommended that agreements which are reached between employers and employees should be reduced to writing in order to establish certainty and good will.

III. On February 28th (calendar day March 1st), 1934, Senator Wagner accompanied the introduction of his Labor Disputes Bill with certain remarks.[10] Still clinging to the ideal of possible cooperation between most employers and employees, yet frankly alert to the needs brought out by the experience of the National Labor Board, he stated that his experience as chairman, had confirmed his belief that most employers and employees desired to obey the law; but that safeguards must be set up against the devastating effects of unfair minorities who force almost all to follow similar tactics. His remarks dealt with defects

[10] Vol. 78, Congressional Record, p. 3444.

under Section 7a and the way in which his Bill would eliminate those defects. Here is the substance of the speech:

"By Section 7a of the Recovery Act, Congress attempted to open the avenues to collective bargaining by restating the rights of employees to act through representatives of their own choosing free from the influence of employers. But Section 7a did not outlaw the specific practices by which some employers set up insuperable obstacles to collective bargaining.

"The greatest obstacles to collective bargaining are employer dominated unions which have multiplied with amazing rapidity since the enactment of the Recovery Law. The Bill which I am introducing today forbids any employer to foster or participate in or influence any organization which deals with problems that should be covered by a genuine labor union.

"Failure to meet the problem of employer domination over employee organizations has not been the only defect of Section 7a of the Recovery Act. This section provides that employees shall be free to choose their own representatives. It has been interpreted repeatedly to mean that any employee at any time may choose his own representative or may elect to deal individually with his employer.[11] Such an interpretation which illegalizes the closed shop strikes a death blow at the practice and theory of collective bargaining. No real advocate of collective bargaining would argue that a worker should be free to bargain individually even after the overwhelming majority of his coworkers desire an agreement covering all.

[11] Prentice Hall, Federal—Trade— and Industry, Vol. 1, p. 5506.

"The third major defect of 7a is that it guarantees employees the right of organization but not the right of recognition. My six months experience as Chairman of the NLB has proved conclusively to me that the second guaranty should be firmly established by Congress. Over 70% of the disputes coming before the Labor Board have been caused by refusal of employers to deal with representatives chosen by their workers.[12] The new Bill, if enacted into law, will remedy this evil. It is modeled upon the successful experience of the Railway Labor Act which provides that employers shall actually recognize duly chosen representatives and make a reasonable effort to deal with them and reach satisfactory agreements."

Senator Walsh, Chairman of the Committee on Education and Labor, later in the session during the debate on the compromise Joint Resolution (HJR 375, Public Resolution No. 44, 73rd Cong., 2nd Session) stressed the underlying obstacle that prevents any real collective bargaining. He pointed to the weapon of economic pressure (threat of job loss), which employers use to prevent the exercise of collective bargaining. To make 7a effective, Congress must definitely outlaw these pressure practices. Till then 7a will have no real force and effect.

After many long hearings the Senate Committee recast the Wagner Bill into the National Industrial Adjustment Act.[13] Its administrative

[12] The ten months summary carried in connection with the National Labor Board Decisions indicate that Section 7a formed the basis of complaint in 2655 out of 3755 cases.

[13] Vol. 78, Congressional Record, p. 10352.

and enforcement provisions represent the views of Senator Wagner as Chairman of the Board, modified by those of the Senate Committee, after accumulating knowledge of many as to the facts and faults of 7a. These provisions thus reflect directly the defects and deficiencies which marred the administration and enforcement of 7a during the life of the NLB. The chief change in the substituted Bill was its restriction of the number and form of unfair labor practices. The important one touching the refusal of employers to recognize and use reasonable efforts to deal with the representatives of employees was knocked out. Remaining were the following ones: (a) For employer to attempt by interference or coercion to impair the exercise by employees of their right to form labor organizations and to designate representatives of their own choosing. (b) For employer to interfere or dominate in the administration of labor organizations or to contribute financial support to them; (c) For employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

In other respects it remained pretty much the original Wagner Bill. The Board was to have power to subpoena witnesses and compel testimony in connection with its hearings subject to the right of immunity as to self incriminating statements; it was to have power to order elections and conduct the same; it was to have power to issue cease and desist orders prohibiting any of the unfair labor practices and to take the same into Federal courts for enforcement; and it finally was to be able to take any other decided order into Federal courts for enforcement. In such situations the transcript of facts and findings was to stand unless there was sufficient cause shown for the admission of further facts in which case the case was to be returned to the Board for appropriate action.

Senator Walsh made some valuable comments on this revised bill in an article in the New York Times, June 3rd, 1934, and reprinted in Vol. 78, Cong. Rec., P. 10352. He pointed out that every power granted to the Board with respect to the taking of testimony, summoning of witnesses, and like matters, is duplicated in at least a majority if not all the Federal administrative tribunals such as the Federal Trade Commission, the Interstate Commerce Commission, the United States Employees Compensation Commission, and the proposed Communications Commission (since established).

The article further explained that by establishing a quasi-judicial board, this Bill definitely established the agency that shall give the final administrative interpretation of the law. Of course, court review re-

mains available, as it always does under our system of government. Another important aspect of the Bill, as amended, is the emphasis it places on the strictly judicial aspect of the work of the Board. When a case cannot be adjusted because of the continuance of unfair labor practices or because of disputes over representation it can be referred to the National Industrial Adjustment Board which can then judicially consider it. This makes two things plain: First, the Board is to enforce the law as written by Congress; and the second, the Board acts only when enforcement is necessary and adjustment has failed.

The National Industrial Adjustment Act never came up for consideration in the regular order of business. It was presented by Senator LaFollette in lieu of the compromise Joint Resolution that finally became law, but was withdrawn. But the story about that is not part of the experience of the National Labor Board. It is instead, the prelude to the story of the National Labor Relations Board. And it is to that story we must now turn.

The National Labor Relations Board—Chapter II

The Establishment of a Statutory Board

June was slipping by in 1934. The pressure to adjourn was coming from all sides. Congress was tired and wanted to go home. It foresaw the protracted bitter debate that must ensue if the modified Wagner Disputes Bill (now known as the National Industrial Adjustment Bill) were to come on the floor. Nevertheless there were some senators (our congressional record research was confined to the Senate) who felt that Congress owed it to the country to work out this matter at this session. In this dilemma President Roosevelt through his spokesman, Senator Robinson, offered a halfway compromise to cut the gordian knot.[14] Senator Wagner announced that though his Labor Disputes Bill was constructed carefully to solve certain specific evils continually cropping up in the experience of the National Labor Board, he was prepared to accept President Roosevelt's compromise. Fighting to the last against the compromise were Senator LaFollette, Nye, Norris, Costigan, and others. They fought because they knew as Senator Walsh had plainly stated, that 7a would mean nothing until legislation was set up to illegalize certain employer practices and provide adequate enforcing machinery. Senator LaFollette translated his opposition into affirmative action by introducing the National Industrial Adjustment Bill (with certain amendments previously planned on by Senator Wagner)

[14] Senator Robinson's explanation of President Roosevelt's view, ibid., p. 12018.

as an amendment to the Compromise Resolution.[15] At this juncture Senator Wagner found himself in the peculiar position of requesting Senator LaFollette to withdraw from the floor a Bill which was largely his own handiwork. He stated that he did so because President Roosevelt felt that at this time the temporary measure ought to be passed to relieve an emergency situation and that by next year through study, experimentation, and experience it will be able to frame some permanent legislation.[16] Reluctantly the amendment was withdrawn and House Joint Resolution 375 (now known as Public Resolution No. 44) became law.

This Compromise Resolution covered three points. The President was given power to establish a board or boards with authority to investigate issues, facts, practices or activities of employers or employees in any controversies arising under 7a or which are burdening or threatening to burden the free flow of interstate commerce. Such board or boards were to have power to conduct secret elections for the purpose of determining what collective bargaining agency was desired by employees. To carry out such elections the board or boards were to be able to subpeona witnesses, to take testimony under oatht and to order the handing over of necessary relevant documents. Such orders were to be enforceable or reviewable in the same manner as Federal Trade Commission cease and desist orders. Finally such board or boards were given authority to prescribe, with the approval of the President, rules and regulations necessary to carry out its power of investigation and its power to assure freedom from coercion in all elections. Violations of such rules and regulations were to be punishable with fine and imprisonment.

President Roosevelt by executive order on June 29th set up the National Labor Relations Board in connection with the Department of Labor. On it he appointed Lloyd Garrison of Wisconsin as Chairman; Harry A. Millis of Illinois, and Edwin S. Smith of Massachusetts. By the executive order the original jurisdiction of the Board was to cover investigation of facts, issues, and controversies, the conduct of elections as referred to in the Resolution, the holding of hearings, making fact findings regarding violations of 7a, prescribing rules with the President's approval, touching collective bargaining, labor representation, and labor elections, and fulfilling the role of voluntary arbitrator.

The Board was to study the activities of labor boards already created or hereafter to be created, and to report through the Secretary of Labor to the President as to whether or not such boards were to be given pow-

[15] Senator LaFollette offers amendment, ibid., p. 12025.
[16] Senator Wagner asks Senator LaFollette to withdraw amendment, ibid., p. 12044.

ers under Public Resolution No. 44. The Board was to recommend the establishment of new Regional Labor Boards or other special boards vested with these powers. From such boards vested with these statutory powers the Board is to receive reports and to review appeals upon request of such boards, upon a division of opinion, or when the public interest demands it. The National Labor Board was to cease on July 9th and the old Regional Boards to cease when the National Labor Relations Board determined they should. The Board was to have authority to carry on all investigations and procedures now carried on by terminated boards.

The Board was to request the services of the Department of Labor in carrying out its purposes. Each month reports were to be made through the Secretary of Labor to the President as to its own activities and the activities of any boarads vested with statutory powers. The Board may decline to take cognizance of any labor dispute where there is another means of settlement provided for by agreement, industrial code, or law, which had not been utilized. Further no person or agency in the executive branch of the government was to take or continue jurisdiction once the National Labor Relations Board or any other board established in accordance with Public Resolution No. 44 has taken or announced its intention to take jurisdiction, unless it is at the request of the NLRB. All findings of fact and orders were to be final except where cases of other Boards are reviewed by the NLRB.

Condensing all the material just presented, it is found that the only real addition to the powers of the former National Labor Board is this power to order elections and the enforcing powers incidentaly to that process. The Resolution did of course give a statutory sanction to the existence of a Labor Board with power to investigate, which existence had before been established by Executive order. But only one actual power was added.

Reorganization Period

The new Board set to work with determination. By the end of September it had developed itself and the Regional Boards (the old Regional Boards continued) to about the full extent of efficiency within the legislative framework. The country was divided into seventeen jurisdictional areas with a Regional Board placed in a key city in each area.[17] The Fourth District had in addition to its key office in Phila-

[17] First District, Boston; Second District, New York City; Third District, Buffalo; Fourth District, Philadelphia and Pittsburgh; Fifth District, Baltimore; Sixth District, Atlanta; Seventh District, New Orleans; Eighth District, Cleveland, Toledo, and Detroit; Ninth District, Cincinnati; Tenth District, Chicago, Indianapolis, Milwaukee; Eleventh District, Minneapolis; Twelfth District, St. Louis, Kansas City, Mo.; Thirteenth District, Fort Worth; Fourteenth District, Denver; Fifteenth District, Los Angeles; Sixteenth District, San Francisco; Seventeenth District, Seattle, Portland.

delphia a sub-regional office in Pittsburgh with an associate director in charge. The Twelfth District was set up likewise with the main office in St. Louis and the sub-office in Kansas City, Mo. So was the Seventeenth with headquarters at Seattle and the second office at Portland, Oregon. The Eighth District had two sub-offices at Toledo and Detroit (with associate directors in charge) in addition to Cleveland's head office. The Tenth District also had two sub-offices, one at Indianapolis and one at Milwaukee besides the main office at Chicago. Paid directors and associate directors replaced the unpaid Regional Board chairmen who had carried the load of responsibility in the National Labor Board arrangement. This substitution of paid full time executives for the previous voluntary leadership has obviously helped a great deal. Some 544 persons representing the public (the public representative acts as chairman of each of the panels of three), management, and labor make up these various panels of the seventeen Regional Boards as of February, 1935. These panels have been set up in practically all good sized cities over the country. The handling of cases can be carried on by local panels, in most instances familiar with the background, and by being on the spot able to speed through the decisions. The panel system has done much to acquaint leaderes of management and labor with the opposing viewpoint. Standardized forms make possible accurate monthtly checks on the activities of each of the Regional Boards. All Regional Boards now follow the same general rules in the preparation of cases, conduct of hearings (full stenographic reports are now made of each case), giving notice, and holding elections as the result of an informational pamphlet issued on November 13th to all Regional Boards. Personal check with the directors of the eighth and ninth district Regional Boards indicates that the chief handicap met with in carrying on their work is the absence of power to subpeona witnesses and documents.

Possible jurisditional conflicts with the Department of Labor Conciliation Service on one hand and the NRA Compliance Boards have been avoided by agreement on two lines of policy. Where industrial disputes involve apparent violations of 7a the Regional Boards will act. But constant check has been maintained between the Conciliation Service and the National Labor Relations Board to prevent duplication of effort. All strike cases, even though involving controversies over code provisions other than 7a are to be handled by the Regional Boards rather than the Compliance Boards.

There has been a constant attempt to limit the mediation work to the Regional Boards and spedial representatives from the NLRB. Sur-

cessful mediation demands diplomacy rather than detachment. The NLRB from the first has set its eye on the achievement of a completely judicial approach. It hoped truly to become the Supreme Court of Labor. If a case takes on national importance as in the Cleveland A and P case the Board has not hesitated to inject itself into the controversy in its mediatory capacity, but such has definitely been the exceptional situation. Fact finding, in those cases that present basis for judgment, is to be reserved to the Regional Board. If the National Board decides to review any lower decisions it ordinarily accepts the transcript and hears only argument at the hearing. This procedure is wise and fair, since from a practical standpoint it would not be feasible to bring witnesses to Washington. The Board has gone far to make of itself a quasi judicial Board charged with the duty of thoroughly interpreting 7a in a realistic, clear way and then applying it to the new fact situations as they arise. Much of this can be attributed to the calibre and quality of the non-partisan personnel of four men who have served or are serving. To maintain its judicial function as a so called Supreme Court of Labor, the National Board has fashioned certain devices for its own special need. Thus it will often order show cause hearings before the proper Regional Board, or its own special agent, or will return a case to the Regional Board for the taking of additional testimony. It has considered appeals a matter of grace, not right, and has accordingly often refused review. Unfortunately the success of its hearings have been at times directly affected (when it seeks to probe for extra testimony at its own or special agent's hearings) and at all times indirectly affected, by lack of power to compel the attendance of witnesses, to compel the turning over of pertinent documents, and to give and administer oaths.

The NLRB in spite of the increasing number of cases coming before it has been able to keep up with its docket. Even the absence of a chairman for almost a month did not impair the discharge of duties.[18] Further, at the same time it has been able to carry forward the investigation into the activities of all the other labor boards charged in any way with the enforcement of section 7a, as ordered by the executive order of June 29th, 1934.

Results

Regional Boards.—The six months' summary of the NLRB shows that 3437 cases were handled by them from July 1, 1934, through

[18] Francis Biddle appoined to fill vacancy caused by Lloyd Garrison's resignation. N. Y. Times, November 17th, 1934.

December 31, 1934.[19] These cases involved 1,195,247 workers. It must be remembered that the absence of standardized forms for the first couple of months prevent the figures being entirely accurate but they do give a general picture of the number of the cases and of the workers involved. Of these 3437 cases, 3075 have been closed; 1315 by agreement, 566 by decision, and the remainder in some other manner. On December 31, 1934, 528 cases were pending before the Regional Boards.[20] Of the total cases handled, 691 had to do with actual or threatened strikes, involving 495,371 workers actually striking, locked out, or threatening to strike. 514 strikes were settled, involving 196,910 workers; and 469 strikes involving 411,469 workers, were averted. 225,664 workers were reinstated. Of the total cases handled, 2937 involved violations of 7a; 376 wage demands; and 14 reduced earnings. 82 cases were submitted jointly to arbitration.[21]

These figures have little significance unless we do some comparing. Compared with the figures of the first ten months of the National Labor Board they suggest some interesting lines of thought.[22] Though we are comparing a six-month period with a period four months longer we find that the total for the NLRB is 94 per cent of the NLB total. The number of cases closed under the NLB is but 14 more than the total settled under the NLRB. Assuming, that closed and settled mean the same thing in this regard, it appears that the effectiveness of the Regional Boards as mediators is greatly increased. On the other hand there were only 68 per cent as many workers involved in the second period as in the longer first period. This would indicate that the volume of cases is increasing but the businesses, or possibly departments of businesses covered by these cases involve fewer employees. Taking the figure of 651 strikes and threatened strikes coming before the Board as correct for the period of the NLRB, comparison shows that there were only 52 per cent as many strikes in the six months' period. Most interesting comparison of all, 7a was the cause of complaint in 85 per cent of the six months' case total while it was the cause of complaint in 75 per cent

[19] This period is slightly different from the six months' period from July 9 to January 9, since the Regional Boards made monthly reports on the first day of each month, and, therefore, includes the period from July 1 to July 9 before the National Labor Relations Board was appointed. 6 months summary, NLRB, Release Feb. 13, 1935.

[20] The apparent discrepancy in these figures is explained by the fact that a number of the cases closed since July 9 have been carried over from the days of the National Labor Board. Ibid.

[21] The total figure of 1,195,247 workers involved includes 210,000 in the textile strike reported by the Philadelphia Board; and 250,000 in a threatened strike of building service employees, reported by the New York Board. The 225,664 workers reinstated includes those reinstated after discriminatory discharges other than strike cases, as well as those reinstated after strikes and lockouts. Ibid.

[22] 10 months summary included in Decisions of NLB. See above.

of the earlier period. The need of adequate enforcement appears even more acutely in the latest period tabulated.

National Labor Relations Board.—The figures on the cases of the NLRB are not nearly as encouraging as those of the Regional Boards measured by successful disposition. But it must be remembered that the Regional Board figures are an indication of the effectiveness of this new machinery viewed in its mediatory capacity while those of the National Board indicate its effectiveness in its judicial capacity.

I. The six months summary shows that of the 86 decisions handed down by the Board no violations were found in 14 cases, while four were arbitration awards. This left 68 cases requiring compliance. Compliance was obtained in only 17 cases. Later the steps taken to enforce these other cases will be described. For the time being it suffices to point out that compliance was obtained in only 25 per cent of the cases.

II. The Board proceeded firmly and resolutely with its fundamental task of construing 7a and applying it to the various fact situations presented. In the Houde case we find the Board speaking in this manner: "Section 7a must be construed in the light of the traditional practices with which it deals, and the traditional meanings of the words which it uses. When it speaks of 'collective bargaining' it can only be taken to mean that long observed process whereby negotiations are conducted for the purpose of arriving at collective agreements governing terms of employment for some specified period. And in prohibiting any interference with this process, it must have intended that the process should be encouraged, and that there was a definite good to be obtained by promoting the stabilization of employment relations through collective agreements."[23]

On the detailed question of collective bargaining, the Board repeated the position of the NLB as to the existence of the correlative duty to negotiate on the part of the employer. Such negotiation must embrace efforts and counter efforts to reach an agreement. It added two other principlees. Though the breach of a collective agreement is not in itself a violation of the statute the discharge of employees against an implied term of agreement without exhausting all means of re-negotiation, amounts to a breach. Activities of so-called "run away employers" who sought to avoid collective bargaining by moving their business has been definitely proscribed.

Its position on majority rule is stated in the Houde case as follows: "When a person, committee, or organization has been designated by the

[23] Case No. 12, p. 35, Decisions of NLRB.

majority of employees in a plant or other appropriate unit for collective bargaining, it is the right of the representative so designated to be treated by the employer as the exclusive bargaining agency of all the employees in the unit and the employer's duty to make every reasonable effort, when requested, to arrive with this representative at a collective agreement covering terms of employment of all such employees without thereby denying to any employee or group of employees the right to present grievances, to confer with their employer, or to associate themselves and act for mutual aid or protection. This principle the Board believes to be the keystone of any sound, workable system of industrial relationship by collective bargaining." As to the proper unit to be selected as the basis for majority rule this must be determined flexibly by the Board, having in mind the growth and nature of labor unions, without laying down too rigid general principles. As to elections, the Board feels that they are a democratic device which should be employed to settle the majority rule question whenever a substantial number of employees, in a particular unit, call for an election.

The statute does not render illegal a "company union," if by that term is simply meant a self-organization of the employees in a particular plant into some form of association for collective bargaining or mutual aid or protection. But the statute does prohibit interference, restraint or coercion of employeres or their agents. Such may arise in respect to the iniation, sponsorship, financial support, elections, by-laws, or other affairs of any labor organization, including a plant organization or company union.

Unless the company union plan has been submitted in a bona fide manner for their approval, participation under the plan will not amount to approval. In certain extreme cases of interference or coercion the Board has disqualified the company union as a possible agency for collective bargaining. Thirty per cent of the 86 cases had company union (formed or revived since NIRA) for the main or attendant cause of the complaint.

By far the most frequent form of 7a violation is discrimination, being involved in approximately half the cases heard by the Board. It has arisen in a variety of situations, including discharge, layoff, demotion or transfer forced resignation, or division of work, and in connection with reinstatement following a change in corporate structure, strike, temporary layoff, or transfer of plant. In numerous cases of this type the Board has ordered employees reinstated to their former positions.

III. The NLRB included in its six months summary certain general conclusions about other industrial labor boards gained as result of

research into their activities. These conclusions must be repeated in order to authentically touch up the background of the NLRB's activity. Questionnaires were sent by the Board to all boards which were then believed to possibly be handling 7a cases. From the answers received from most boards, personal interviews with others, and by its own independent investigation, the following general facts were discovered and these general conclusions were reached. They are reprinted exactly from the six months' summary.

"There are two board handling 7(a) cases established by code. These are the National Bituminous Coal Labor Board (including six divisional Bituminous Coal Labor Boards) and the Newspaper Industrial Board. The code for the Electrotyping and Stereotyping Industry provides for a board authorized to handle labor disputs, which in the terminology of the N.R.A. includes 7(a) cases. This Board has not functioned, however, in any 7(a) cases. This is also true of a similar board in the Printing Ink Industry. Besides these four boards, not considering six or seven committees still in the process of formation, boards have been authorized to handle *labor disputes* by Administrative Order in nine industries. These are: Coat and Suit, Wool Textiles, Cotton Textiles, Lithographic Printing, Photo-engraving, Rubber Manufacturing, Rubber Tire Manufacturing, and Shipbuilding and Shiprepairing.

"Three of these authorizations (wool, silk, and cotton) were superseded by the Textile Industrial Relations Board. In two cases (rubber and rubber tire manufacturing) it proved impossible to establish a committee. The remaining four boards have not actually handled any 7(a) cases excepting by mediation.[24]

"Five other industrial boards deal with 7(a) cases, of which four were created by Presidential Executive Order (The Automobile Labor Board, the National Longshoremen's Board, the National Steel Labor Relations Board, and the Textile Labor Relations Board), and one by Administrative Order of the Secretary of Interior (Petroleum Labor Policy Board).

"In few industries, therefore, do we find boards handling 7(a) cases. Proper handling of such cases involves administrative machinery which can act promptly, and the expense of such machinery is one reason why so few such boards have been created. In industries where unions are relatively weak, and would, therefore, be relatively weak in representation on the board, labor has not been active in the establishment of such boards. Where labor is highly organized in a particular industry, there is less need for boards to handle 7(a) cases, which are comparatively rare. There is less reason for discriminating in the unionized field where collective bargaining has been established. Therefore, it is probable that few new industrial boards for handling 7(a) cases will be established by consent.

[24] The handling of *labor complaints*—7(a) cases are not included in this category—has been authorized by Administrative Order for nine boards or committees, in addition to those authorized for disputes, namely in the following industries: Cigar Manufacturing, Commercial Relief Printing (16th Zone—N. Y.), Cotton Garment, Dress Manufacturing, Infants' & Children's Wear Mfg., Lumber & Timber, Men's Clothing, Men's Underwear, and Textile Print Roller Engraving, but it was found impossible to establish a committee in the Lumber and Timber Industry and the Board for Cigar Manufacturing is not functioning as yet. 6 months summary, NLRB. Release February 13th, 1934.

"We do not believe that the setting up of separate industrial boards with authority to handle 7(a) cases should be encouraged. As already noted, to handle such cases promptly and effectively, it is necessary to have regional boards with full-time personnel, to which complaints can be referred without the inconvenience and expense to complainants involved where only a central board has been established.

"Our study of industrial boards has convinced us that 7(a) cases should be handled by non-partisan boards of the type of the Steel, Textile and Petroleum Boards, or the National Mediation Board (railroad board). Where boards are bi-partisan friction develops from the difficulty of the representatives of industry and labor agreeing. The neutral chairman also is forced into an appearance of "taking sides," which prejudices him with one party or the other. Although the panels handling cases on our Regional Boards are bi-partisan, nevertheless their decisions are merely recommendations subject to the review of the National Board, which is non-partisan.

"Decisions involving not only findings of fact but interpretation of a statute as general in terms as 7(a) require a dispassionate approach. This is ordinarily lacking in a bi-partisan board. Insofar as possible, decisions should be formulated either in the first instance or on appeal by one body, so that the interpretation of the Section and the formulation of the labor law, which will necessarily be built up on the decisions, may be consistent. A decision of 7(a) cases sets a precedent for and affects *all* industries. On the other hand, interpretations of wages, hours and working conditions do not in most instances tend to the formulation of general principles and precedents. For such bi-partisan boards function most successfully.

"Our investigation has revealed that many boards now authorized to handle 7(a) cases suffer from cumbersome procedures which cause needless delay and expense. For the reasons set forth we do not believe that new industrial boards should be established to handle 7(a) cases—certainly not unless they are approved as to form and procedure by our Board, which should be ultimately responsible not only for interpretation of Section 7(a) mut for its effective application through administrative machinery. The inadequacies of a particular industrial board should not be allowed to interfere with the extension of the principles of collective bargaining to the workers coming under the protection of the statute. Therefore the decisions of all industrial boards with respect to 7(a) cases should be subject to review by this Board.[25] Such appeal already exists from the decisions of the Textile Boards. It is doubtful whether

[25] The Dean Jennings case illustrates the necessity of this position. The NLRB on December 12th, 1934, affirmed its opinion rendered on December 4th. Such opinion held that the San Francisco Call Bulletin had forced Dean Jennings to resign in violation of 7a. The employer had declined to contest the case on the merits but argued it on the jurisdictional grounds. Its contention was that the Daily Newspaper Industrial Board had proper jurisdiction. Recommendations to refrain from handling the case were made by Blackwell Smith, NRA Counsel and Donald Richberg, Executive Director of the National Emergency Council. The Board, however, found nothing in the Newspaper Code to indicate the industrial board was given exclusive jurisdiction over 7a cases. It decided that under the board jurisdiction of the NLRB it should retain jurisdiction of this case. But the President on January 22nd by letter narrowed the Board's competence to deal with such type of cases to mere investigation and recommendation to himself. The Board was thus divested of jurisdiction in this case and it is presumed the case was turned over to the Newspaper Industrial Board. What has happened to it since, discovery has not disclosed. But surmise is entirely in order.

there is any appeal from the Steel Board. The National Labor Relations Board may take original jurisdiction of 7(a) cases coming within the competence of industrial boards (subject to the qualifications expressed in the President's letter to the Board, dated January 22, 1935). We have, however, followed a general policy not to take jurisdiction over such cases unless special circumstances make it advisable to do so, such as the breakdown or failure to function of the machinery of the particular board before which the case is pending."

IV. Courage and frankness have continually characterized the acts of the National Labor Relations Board. In such a spirit it fearlessly handled the Jennings Case in the face of mighty opposition by the powerful newspaper interests. Richberg and Roosevelt, not the Board, capitulated. With the same degree of frankness the Board has admitted the vital defects in its enforcement machinery.

The chief means of enforcement which the Board has employed to gain compliance is recommending to the Compliance Division of the NRA that the offending company's Blue Eagle be removed. Of the thirty-six such recommendations the Blue Eagle has been removed in 24 cases. In a few cases where the insignia means something from an economic standpoint, injunctions have been obtained in the Supreme Court of the District of Columbia against such action.[26] In the other cases the removal has been of no effect. There are few cases recorded where a violating company has later complied with the order and received back its Blue Eagle.

The Six Months' Summary says that "Nineteen cases were referred to the Department of Justice. Seven of these were returned on the ground that because of the absence of interstate commerce, or for some other reason, Federal action was not warranted. Four of these seven have been referred to State District Attorneys for enforcement in states where appropriate enforcement acts, supplementary to the National Industrial Recovery Act are in effect. Of the remaining twelve seven have been referred by the Department to United States Attorneys for the initiation of appropriate legal proceedings, and five are still pending in the Department. In addition to the foregoing, the National Labor Relations Board transmitted to the Department of Justice one case which had been decided by the National Labor Board; this case has been sent by the Department to the United States District Attorney for the District of Kansas for enforcement. In another case, a 7(a) complaint, which has not come before this Board for decision, was referred directly to the Department of Justice for the institution of a bill in equity.

"Court enforcement (other than enforcement of election orders) under the present machinery is slow, uncertain, and cumbersome. The proceeding may be by bill in equity to force the employer to bargain collectively, or indictment for violation of Section 7(a) as embodied in the particular code under which he may be operating. The record before the Board serves as nothing more than the basis for the Attorney General to proceed. It cannot

[26] 2 U. S. Law Week 7. Whether such injunctions shall be made permanent, now awaiting trial on merits.

be filed or used in court, and the case must be tried de novo. After a bill in equity is filed the employer has 30 days to answer; or he may move to dismiss or for a bill of particulars. The case cannot, necessarily, be tried at once. As it must be brought in the district in which the defendant resides, or where if a corporation, it is incorporated, there is often the burden and inconvenience of bringing witnesses from a distance."[27]

It must be remembered that private persons cannot seek redress in the courts for violations of 7a. The attorney general or district attorney brings suits as government actions.

Action has been taken by bill of equity only in the Houde Engineering Corporation Case. This serves to illustrate the unfortunate delay connected with the present means of attempted court enforcement. The Board hearing was on the 24th of July, 1934. The acts complained of, failure to recognize and deal with the A. F. of L. union selected by the majority (by Nat. Labor Bd. election) to represent the employees, had occurred sometime before. On August 30th, 1934, the decision ordering the corporation to deal with the representatives of the majority was handed down. The case was referred to the Department of Justice for action but it was not until the 4th of December that a Bill of complaint was filed in the western district of New York. As yet (April 29th) the case is awaiting argument on demurrer. A statement in the first monthly report of the Board is appropriate as a comment. "In the decision of cases arising under Section 7a, it is not enough that decision be just. It must also be prompt. The rights created by Section 7a cannot more effectively be destroyed than by delay in hearing the cases, delay in deciding them, and delay in enforcing the decisions."[28] The National Labor Relations Board has done everything within its legislative power to fulfill its pledge as to speed in hearings and decisions. The procedure has bogged down as to enforcement after the case leaves the hands of the National Labor Relations Board. It must be recognized that there has been a tremendous spectre of industrial oposition to Section 7a, ominously acting as a brake on all these attempts to enforce the decisions of the Board. That spectre has become bolder and more vocal since Judge Nields handed down his decision in the Weirton case adverse to 7a.[29] So until Supreme Court sanction is placed on the right of the Federal Government to regulate employer-employee relationships as a necessary part of the full stream of interstate commerce, and until there is a determination as to whether or not majority rule is permitted under 7a and whether if so, it doesn't invade the minority's rights under the fifth amendment, and until illegalized employer interference, coercion, and

[27] Six months summary, NLRB, Release February 13th, 1935.
[28] Release, Dept. of Labor, Aug. 14th, 1934.
[29] 2 U. S. Law Week, p. 631.

restraint are given more definite court contour, and until such prohibitions are found not to violate the fifth amendment we can well assume that the spectre will continue to stalk behind, paralyzing enforcement.

Enforcement of election orders presents another question. Public Resolution No. 44 gave the power of ordering collective bargaining elections, and the power of compelling witnesses and pertinent documents. The resolution stated that there was to be enforcement and review of these orders in the same manner as those of the Federal Trade Commission. That power has been exercised in certain cases. But as yet there have been no completed court tests of the power.[30] However at the present time there are pending before the Circuit Court of Appeals some eleven petitions of review of election orders.[31] For example the Firestone Rubber Co. and the B. F. Goodrich Rubber Co. have such petitions of review before the 6th Circuit Court at Cincinnati. It would appear that the basic constitutional question is the same as in the Weirton and Houde cases. Does the Federal Government have the right to regulate employer-employee relationships of an interstate business? The question as to the legality of the power to order elections, compel witness attendance in pursuance thereof, and to enforce the orders as the Federal Trade Commission has and does, would appear to have been well settled.[32]

What of the Future?—Chapter III

The Wagner Bill Points the Way

The stories of these two Boards suggest the direction traveled since August 5th, 1933. The road taken definitely points the way that must yet be taken before collective bargaining will become completely integrated into our economic life. A permanent administrative Board coupled with sufficient subagencies must be established. To this Board must be given the powers to prevent those practices which in many instances have reduced this widely heralded charter of labor's rights to mere paper. Assuming that impending constitutional barriers will be crossed, what, specifically, will this yet untraveled road be like? One projected map is at hand, the second Wagner Labor Disputes Bill.[33] In most instances it correctly sketches the direction which will avoid the defects

[30] Ames Baldwain Wyoming Co. v. NLRB, CCA 4th Circuit (Nov. 1st, 1934), is not on the merits of the power to order elections. It merely held that until the Labor Board made a final election order there was no basis for review by the Circuit Court of Appeals.

[31] 2 U. S. Law Week 770.

[32] Sears Roebuck and Co. v. Federal Trade Commission, 258 F. 307; National Harness Manufacturers v. Federal Trade Commission, 268 F. 705; T. C. Hurst and Son v. Federal Trade Commission, 268 F. 874.

[33] S. B. 1958, introduced February 15th (calendar day February 21st), 1935.

and deficiencies which have existed along the highway already passed over. At certain places it appears to me defects are not avoided. Those places will be pointed out at the proper time.

The Wagner Bill proposes to create a National Labor Relations Board which shall be an independent agency in the executive branch of the government. Impliedly it is to be permanent and non-partisan. For greatest future effectiveness it is planned to make it independent of the Department of Labor. The only argument that would appear in favor of making it answerable to the Secretary of Labor would be that in this way better coordination could be maintained with the mediatory and conciliatory functions of the Labor Department. But since the new Bill does not give the new Board any express powers of mediation and conciliation, the coordination that is necessary can be achieved without dependence. Independence on the other hand should spell more courage and speed in the process of making collective bargaining actual and living. Nonpartisanship and impartiality are highly essential to the maintenance of the proper judicial approach to each new situation, to the building up a very important new body of labor law, and to the swift enforcement of each order not complied witth.

Unfair Labor Practices

Section 7 of the Bill declares once more the rights of employees to form, assist, or join labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

It is the following section (Section 8) that sets out the practices of employers against the rights of Section 7, to be known as unfair labor practices, that are henceforth to be proscribed. It is only by the outlawing of them that Collective Bargaining shall have any real validity; and so it is, that this section presents the real heart of the Bill. Four series of unfair labor practices are listed in Section 8. These fence off the area in which no employer can henceforth legally tread; and it is these unfair labor practices which we shall find the Board is empowered to prohibit. Each of these will be repeated exactly as it appears in the Bill. If comments are appropriate they will follow.

(a) The first unfair labor practice: "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." This largely repeats the words appearing in Section 7a (1) of NIRA. (Title 15 USCA 701-712). Though experience has found the words rather incapable of exact definition it is well to reinsert them. For it

will offer the Board elasticity of approach as new problems and situations arise which present practices which must be prohibited. To illustrate: It would be against our ideas of freedom of speech to say by statute, that employers or their agents should not be allowed to mention the word "union" or the word "organizer" to their employees. Yet the situation often exists where an employer, by continual questions about whether an organizer for a union had been around, or by an employer or his agent relating actual union meeting happenings (thus proving to the employee that the company had spotters at the meeting), could raise an implicit threat against any employee joining. The result is a clear nullification of the employee's right of collective bargaining. It is in new situations such as these, each with its own particular facts, that the Board must have broad leeway in declaring what are unfair labor practices. (b) The second unfair labor practice: "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board . . . . , an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." This bans the evils of company unions—employer domination, control by financial support, and other interferences—without actually prohibiting labor organizations whose scope is confined to the company. (c) The third unlawful practice: "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (USCA Title 15, 701-712) as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such organization is the representative of the majority of the employees in the appropriate collective bargaining unit covered by such agreement when made." This seeks more specifically than does the first unfair practice to illegalize the terrific economic pressure which employers exert over employees, by means of threatened job loss, wage, hour, and condition discrimination, in order to prevent unionization. At the same time it clears up the misunderstanding as to whether 7(a) outlawed the closed shop by specically permitting the closed shop provided the bargaining agency is legal and provided it represents the majority, (d) The fourth unfair labor prac-

tice: "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act."

It would seem that in the light of numerous decisions of the NLB and NLRB and official statements of their principles (see excerpt, Houde case. Milton Handler report on NLB, and NLRB statement of principles, above) the first unfair labor practice is broad enough to embrace refusals of employers to deal with the collective bargaining agency representing his men. But the constant repetition of this practice, striking as it does at the heart of collective bargaining, suggests the need of an imperative prohibition. Later on the bill states (Section 9a) that "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or group of employees shall have the right at any time to present grievances to their employer through representatives of their own choosing." This expressly declares the necessity and lawfullness of majority rule and impliedly declares the duty of the employer to negotiate. But neither at this place or any other place is there a direction either affirmatively or negatively that such refusal will amount to an unfair labor practice. In the first Wagner Bill introduced at the 2nd session of the 73rd Congress (S. 2926), such refusal to negotiate was definitely made an unfair labor practice. The modified National Industrial Adjustment Bill deleted it and it remains still deleted in the present Bill 13. Apparently the sponsors feel that the first unfair labor practice includes it. Possibly so, but since such refusal topples the whole structure of collective bargaining, it should be specifically outlawed and not merely left to optimistic conjecture.

These unfair labor practices very properly do not include any brakes on labor union activity. The organized industrialists have been quite insistent that "labor union coercion" should be outlawed. But such a request, sounding perfectly fair on the face, does not deserve attention when scrutinized. Until the previous unfair labor practices of employers are prohibited by law there is nothing in our law to eliminate this all-powerful economic weapon of threat of job loss by which the employer keeps his men divided against themselves, and in a position where he can dictate any and all terms of employment. This is real economic coercion and must be prevented. But the attempts of a labor union to encourage membership, though annoying to some individualistic employees, at no time assumes any possible similarity to the economic coercion described

above. Certainly just because employers are proscribed from certain practices, in fact told to keep their hands completely off unionism, labor unions should not be prevented from persuading membership. Unionism can only exist if continual organization is carried on. On the other hand, if ever these attempts to encourage membership are accompanied with acts of violence, assaults, threatened assault, mayhem, etc., there are sufficient laws on the books to punish them.

Scope of the Bill

The Wagner Bill, Sec. 2(2) (3), expressly excludes from its effect all United States, state, and local employees, agricultural laborers, domestic employees and those employed by parent or spouse. It appears that there is no ground for excluding Federal employees, agricultural laborers and domestic employees. The right of self organization should be definitely guaranteed by law to all Federal employees. For with the trend towards a continual increase in the ranks of Federal employees the need of their self organization is growing. Policy conflicts, which might arise if the NLRB had to enforce an order in the Courts against the particular government official, seem as merely academic possibilities. Certainly upon the finding of an unfair labor practice by the Board there would be compliance and if not, could not the Circuit Court or Court of Appeals enforce with mandamus? The Donovan Case arising in the. National Recovery Administration last summer shows the necessity of guaranteeing to government workers also, that same freedom from coercion and interference which makes real collective bargaining possible.[34]

The violent opposition to agricultural laborers union in the Onion Fields of Ohio, in the Imperial Valley of California and in the tenant farmer region of Arkansas, gives adequate testimonial to the necessity of extending collective bargaining guarantees to the agricultural laborers of America. Domestic employees none the less need collective bargaining because their employment is not collective. For actually their wages are set by collective conditions.

The present Wagner Bill, Section 2(3), does not exclude workers who take the places of striking employees, from the definition of employees. In other words strike breakers would be allowed to participate in a collective bargaining election held among all the employees. Such outsiders should not be allowed to do so. Obviously they would support

[34] American Federation of Govt. Employees ex. rel. John L. Donovan, Case No. 39, Decisions of NLRB.

the employer's position and thus probably nullify the collective bargaining rights of the real employees.

The Wagner Bill decisively settles the question of the National Board's relation to other labor boards. At one point, Section 6(b) the Board is directed to study the activities of such boards and agencies as have been or may be hereafter established to deal with labor disputes, and to reecive from such boards reports of their activities. At another point, Section 10(a), the Bill states that the power to prevent unfair labor practices is exclusively with this Board and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise except as a later section permits equity proceedings by the several district attorneys at the sole request of the National Labor Relations Board. This takes away all jurisdiction of enforcement from other Boards. The Board may in its discretion, defer its exercise of jurisdiction over any such unfair labor practice in any case where there is another means of prevention provided for by agreement, code, law, or otherwise, which has not been utilized. Section 10(b). But in any case where the Board has so deferred, the Board may at any time thereafter institute proceedings under this Act in order to assure the effectuation of the policy of this Act and the development of a uniform body of administrative interpretation and practice with respect to unfair labor practices as defined in the Bill. This should remove any chance of a repetition of another Dean Jennings case. The Board is not restricted to the right of review over these other boards. It can walk right into a situation, hold a hearing, and hand down an order regardless of what had already been done.

The Wagner Bill, Section 10(c, d, e, f), grants the Board power to investigate any cases of unfair labor practices, hold hearings, make findings and orders, and enforce such in the Circuit Court of Appeals, or the Court of Appeals for the District of Columbia. It also grants power by Section 12(a, c) to act either by itself, or designate some agent or agency to act as Arbitrator in labor disputes, and in case of breach of the arbitration agreement to enforce the same in the appropriate District Court or the Supreme Court of the District of Columbia. But the Bill grants no mediatory or general investigatory powers which would include mediation and conciliation. Likewise the sub-boards are not given any such powers. The area is confined strictly to unfair labor practices and arbitration. This means that if there is no unfair labor practice involved, the National or Regional Board must immediately back out leaving it apparently to either the Compliance Boards or Department of Labor conciliators. Actually this will not cut down the

Board's total jurisdiction a great deal if the present type of cases continue. For the six months' summary showed that 85% of the cases handled by the regional labor boards are 7(a) cases.

This determination as to future jurisdiction provokes two lines of comment. In the beginning of the NLB story the guiding philosophy of the Board was projected into the future. The future has arrived. But only half of the projection remains accurate. The Board has and will continue to build up a living body of collective bargaining law shaped to protect the workers' rights. But the psychology of the conflict still exists. And apparently the mediatory days of the National and Regional Boards, dedicated to substituting negotiation for conflict, are over. The new Board will achieve that quasi-judicial character which has been the expressed goal of the NLB and the NLRB and of those who have been the closest students and champions of the Labor Board. With such a goal reached collective bargaining may then become a reality. This leads to the other line of comment. It has been apparently thought wise to remove the National and Regional Boards in the future from any possible area of jurisdictional dispute with the Labor Department conciliators. Such dispute and duplication of effort have arisen in the past year and nine months. But that is to exist no longer.

The Wagner Bill supplies the power necessary to hold adequate hearings. Proper authority for Board, member, agent, or agency to issue and serve complaints, where they are to be issued and how served, are all set out, Section 13(4), (5). Compulsory process will be available to the Board to subpoena wtinesses, documents, and testimony, Section 13(1). The defendant is to have the use of the power to compel witnesses to attend though the complaining party is not specifically given the power, actually it should work out that all his needed witnesses will be subpoened. For the Board, seeking to get all the facts before it acts, will be anxious to call all witnesses. Contumacy or refusal to obey summons is to form the basis for application to either U. S. District Courts or the Supreme Court of the District of Columbia for contempt proceedings, Section 13(2). All board members, or designated agents or agencies are to have authority to administer oaths at hearings, Section 13(1). Perjury will thus be punishable.

The defense of self incrimination cannot be made to demands to testify or produce evidence though such testimony cannot be used to prosecute the defendant or to subject him to a penalty or a forfeiture, with the exception of prosecution for perjury, Section 13(3). These various steps will result in getting into the transcript all the pertinent evidence.

Such transcript will then be placed on file with the National Board who thereafter may take further testimony or hear argument. The Board will then make its finding of fact and if it has found the company guilty of an unfair labor practice it will make an appropriate cease and desist order, Section 10(d). If it finds no evidence to support the complaint, the complaint will be dissolved. One objection presents itself. It would appear that only the NLRB can make findings of fact. For at all other places where the Bill extends certain authority or powers to member, agent, or agency the Bill definitely states that. But such is not so here, Section 10(d). The result will necessarily be that cases might well become clogged at the bottle neck waiting for the National Board to make its finding of fact. Experience has been that many employers will accept the finding of fact of the Regional Boards and act accordingly. Thus the whole national docket has been greatly expedited. The solution is to extend the fact finding power to member, agent, or agency.

The remainder of the procedure is identical with that of the Federal Trade Commission and thus already tried under fire. Petitions to enforce or review orders (collective bargaining election order included) are entered with the appropriate Circuit Court of Appeals or Court of Appeals of District of Columbia, Section 10(f) (g). The pleadings, testimony, argument, are made part of the transcript and filed with the petition. Unless the court is convinced further facts should be adduced, the facts in the Board's record stand. If new facts are to be brought out the case is referred back to the Board for further testimony and modification, or affirmance of its findings of facts. Once settled, they are conclusive, if supported by the evidence; and no objections not urged before the Board will now be considered unless extraordinary circumstances require it. The Court will then proceed to make a decree enforcing, modifying, or setting aside the Board order. The Court is also empowered to grant such temporary relief or restraining order as it deems just and proper. Petitions under this act are to be heard expeditiously and if possible within 10 days after they have been docketed. The court's jurisdiction is exclusive except as reviewable by the Supreme Court by writ of certiorari. Authority is also given solely to the National Labor Relations Board to proceed de novo in the District Courts through appropriate equity proceedings. It would seem that this right to seek such injunctional relief should be extended to all persons. History under the Anti-Trust laws shows the advisability of extending the right of suit against trust violations to private persons. This subject matter is sufficiently analogous to suggest the necessity of the same broad permission here.

In both these procedures, either in the Circuit Court or Court of Appeals or in the District Court, the court's jurisdiction to grant temporary relief, a restraining order, or to make decrees modifying, enforcing, or setting aside a Board order is not to be limited by the Norris-LaGuardia Anti-Injunction Act (USCA, Title 29, 101-115) Section 10(i). This is extremely important in light of the refusal by Judge Nields in the Weirton case to entertain the government's request for temporary relief, because according to his judgment the equity jurisdiction of his court had been closed to such requests, by the Norris-LaGuardia Act.

These two procedures, particularly the first, arm this new Board with adequate enforcement powers—a long stride from that early hope of enforcement by the sanction of public opinion. No more power could be assigned to the new NLRB as an administrative board. For courts guard jealously their power of judicial review and will retain their appellate control over the findings and orders of the Board even though they may be very loath to overturn any Board decision.

The story of the National Labor Board has been told. The experiences of the National Laobr Relations Board have been related. And now the last finishing touch has been added to the map of the Future, a Future that must come if Collective Bargaining is to become a permanent living part of our economic life.